84-1293

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ALEXANDER L. STEVAS,
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HARRY LEROY KELLEY,
Appellant

v.

TEXAS REAL ESTATE COMMISSION,
Appellee

On Appeal From The Court Of Appeals For The Fourteenth Supreme Judicial District Of Texas

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1.

Whether Subdivisions (B) and (V) of Article 6573(a), § 15(4), Texas Revised Civil Statutes, as construed and applied by the Texas Appeals Court, are repugnant to the United States Constitution?

2.

Whether Subdivisions (B) and (V) of Article 6573(a), § 15(4), Texas Revised Civil Statutes, as construed and applied by the Texas Appeals Court, authorized unreasonable, arbitrary and capricious action resulting in a denial of due process of law to Appellant?

3.

Whether Subdivisions (B) and (V) of Article 6573(a), § 15(4), Texas Revised Civil Statutes, as construed by the Texas Appeals Court, are unconstitutionally vague, resulting in a denial of due process to Appellant?

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties to the proceedings in the Courts below.

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HARRY LEROY KELLEY,
Appellant

v.

TEXAS REAL ESTATE COMMISSION,
Appellee

On Appeal From The Court Of Appeals For The Fourteenth Supreme Judicial District Of Texas

JURISDICTIONAL STATEMENT

Harry Leroy Kelley, Appellant, appeals from the judgment of the Court of Appeals for the Fourteenth Supreme Judicial District of Texas entered in the above-entitled case on April 26, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourteenth Supreme Judicial District of Texas is reported at 671 S.W.2d 936 and is printed in Appendix A hereto, infra, p. A-1. The Supreme Court of Texas denied Application for Writ of Error with the notation "no reversible error" and notification of such is printed in Appendix A, infra, p. A-8. The judgment of the 61st District Court of Harris County, Texas, dated August 10, 1983, is not reported; it is printed in Appendix A, infra, p. A-9. The Findings of Fact, Conclusions of Law and Order of the Texas Real Estate Commission, dated May 5, 1983, are not reported; they are printed in Appendix A, infra, p. A-11.

JURISDICTION

The judgment of the Court of Appeals, affirming the revocation of Appellant's real estate license, was entered on April 26, 1984. A timely Motion for Rehearing was filed on May 11, 1984, and overruled on May 17, 1984; notification of such is reprinted in Appendix A, infra, p. A-18. Application to the Supreme Court of Texas for Writ of Error was filed on June 18, 1984 and supplemented on July 17, 1984 and was refused without opinion with the notation "no reversible error" on October 10, 1984. Timely Motion for Rehearing, filed October 25, 1984, was overruled on November 14, 1984 and notification of such is reprinted in Appendix A, infra, p. A-20.

Notice of Appeal to this Court was duly filed in the Court of Appeals for the Fourteenth Supreme Judicial District of Texas on February 5, 1985; it is reprinted in Appendix A, infra, p. A-21. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES

Fourteenth Amendment, § 1, United States Constitution:

> No state may deprive any person of life, liberty, or property without due process of law.

Art. 6573a, § 15(4) (B) and (V), Tex. Revised Civil Statutes (Vernon Supp. 1982-83):

> Sec. 15. . . . The Commission may suspend or revoke a license issued under the provisions of this Act at any time when it has been determined that:
>
> * * *
>
> (4) The licensee, while performing an act constituting a broker or salesman, as defined by this Act, has been guilty of:
>
> * * *
>
> (B) Making a false promise of a character likely to influence, persuade, or induce any person to enter into a contract or agreement when the licensee could not or did not intend to keep such promise.
>
> * * *
>
> (V) conduct which constitutes dishonest dealings, bad faith, or untrustworthiness.

STATEMENT OF THE CASE

The Appellant, Harry Leroy Kelley, received his Texas license as a real estate salesman on September 9, 1976; he received his Texas license as a real estate broker on April 28, 1981

In February, 1983, the Texas Real Estate Commission sent Appellant a complaint letter alleging that Appellant had engaged in conduct which constituted cause for the revocation of Appellant's Texas real estate broker licen-

sure privileges. The relevant facts that led to this charge may be fairly summarized as follows:

This case involves the purchase by four individuals of lots in Park Place, a subdivision containing 124.1511 acres of land in Montgomery County, Texas. The land is heavily wooded and was attractive to the purchasers as sites for their respective mobile homes. All four of the subject purchasers, on different days between May and August, 1981, visited the subject property for the first time when the subdivision was in a pre-development stage, meaning the roads and utilities were not in yet, trees had not been cleared, and the only access to the lots was by four-wheel drive vehicle. Each of the subject four individuals, taking advantage of pre-development sale terms, signed a contract for the purchase of a lot in Park Place on the date of his first visit to the subdivision. The subject four purchasers were among the very first buyers of lots in the Park Place Subdivision.

Each of the subject contracts recited that "I (the purchaser) do not plan to use this property as my principal residence." Further, in large, conspicuous type, each of the subject contracts stated in paragraph 12:

> 12. National Land Co. will be responsible for providing roads. The roads will be maintained by the County of Montgomery. Water will be provided by Spectra Corp. Sewers will be the responsibility of the individual property owner. The completion of the roads and amenities will be on or before December 31, 1983."

All of the subject purchasers were aware that Appellant was acting as a real estate sales agent in the subject transactions. They knew that Appellant was not responsible for, and had no control over, the construction of

the roads and the provision of utilities to the subject properties; Brown & Root, Houston Lighting & Power Co., and Spectra Corp. were in charge of the provision of roads, electricity and water to the subdivision.

Electricity was made available to the first section of the subdivision, where all four of the subject individuals purchased lots, by mid December, 1981; water was available to the first section by early January, 1982; the roads in the whole subdivision were conmpleted by November, 1982. Appellant sold approximately 250 lots in the Park Place subdivision during the period from 1981 to 1983.

In February 1983, Appellant received a letter from the Texas Real Estate Commission stating in relevant part that the four involved purchasers had filed complaints alleging that Appellant had represented to them at the times of their purchase of the subject lots that roads and utilities would be available to their respective lots by August or September 1981; that the purchasers had relied on said representations in buying the lots; that the roads and utilities were not all in by August or September 1981; and that Appellant's real estate broker's license was in jeopardy. The subject disciplinary proceedings followed. After considering the testimony and exhibits, the sole Texas Real Estate Commission Hearing Officer, Robert E. Owen, ordered that Appellant's real estate broker licensure privileges be revoked and held for naught. In support of said Ruling, the Hearing Officer made the following findings of fact (See p. A-11):

1. Appellant made certain representations to the involved individuals;
2. In reliance on the representations, the involved individuals purchased the subject property;
3. The representations turned out to be false.

There was no finding that Appellant either knew, or with reasonable care should have known, that the roads, utilities and amenities would not be ready by the stated time.

The Appellate Courts affirmed the Order of Revocation of Appellant's license. The Court of Appeals for the Fourteenth Supreme Judicial District specifically held that it was immaterial what Appellant actually knew or reasonably should have known at the time he made the alleged statements; all that was necessary for his license to be revoked was that he, as a salesman, made representations that were incorrect. (See p. A-6).

Appellant first raised the federal questions herein when he filed his Motion for Rehearing in the Fourteenth Court of Appeals attacking the validity of the Court's construction and application of §§ 15(4) (B) and (V) of the Texas Real Estate License Act, complaining that by its Ruling, the Court was condoning the arbitrary and capricious revocation of Appellant's license. In his Application for Writ of Error and his Supplement thereto filed in the Texas Supreme Court, Appellant reasserted his attack on the validity of the subject statutes as construed and applied by the Fourteenth Court of Appeals; Appellant complained to the Texas Supreme Court: that the revocation of his license was arbitrary, capricious and characterized by abuse of discretion; that the subject statutory provisions, as construed and applied by the Fourteenth Court of Appeals, are repugnant to the U.S. Constitution; and that said provisions, as construed, are unconstitutionally vague. The Supreme Court of Texas denied Appellant's Application for Writ of Error.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This appeal presents an important question in regard to the rights of an individual to pursue his chosen profession without fear of the State depriving him of his livelihood by arbitrary action.

The Fourteenth Amendment of the United States Constitution provides that "No state may deprive any person of life, liberty, or property without due process of law." U.S. Const., Fourteenth Amendment, § 1. The right to earn one's livelihood by following the ordinary occupations of life is constitutionally protected. *Terrace v. Thompson,* 263 U.S. 197, 68 L.Ed. 255, 44 S.Ct. 15 (1923). The denial of a citizen's rights to follow a lawful occupation falls within the protection afforded by the guarantee of due process. *Willner v. Committee on Character and Fitness,* 373 U.S. 96, 10 L.Ed.2d 224, 83 S.Ct. 1175 (1963); *House of Tobacco, Inc. v. Calvert,* 394 S.W.2d 654, 657 (Tex. 1965). An individual's business, occupation, or calling comes within the protection of due process guarantees as both "property" and "liberty". *Smith v. Decker,* 158 Tex. 416, 312 S.W.2d 632, 633 (1958); *Terrace v. Thompson,* supra; *Meyer v. Nebraska,* 262 U.S. 390, 67 L.Ed. 1042, 43 S.Ct. 625 (1923).

The requirement of due process is intended to secure citizens against any arbitrary deprivation of rights, whether relating to life, liberty or property; due process takes from the sovereign the power of invading fundamental rights by arbitrary action. *Missouri-K.T.R. Co. v. Rockwall County L.I. Dist. No. 3,* 117 Tex. 34, 197 S.W. 206, 212 (1927). It demands that the law not be unreasonable, arbitrary, or capricious, and that the means selected have a real and substantial relation to the object

sought to be obtained. *West Coast Hotel Co. v. Parrish,* 300 U.S. 379, 81 L.Ed. 703, 57 S.Ct. 578 (1937).

In the present case, the Court of Appeals has construed the subject statutory provisions to mean that a person's right to follow his chosen occupation as a real estate broker/agent can be revoked IF his representations about the happening of future occurrences turn out to be incorrect, as long as a buyer relies on the representations. According to the Court of Appeals' construction and application of the subject statutes in this case, there is no need for there to be substantial evidence and findings of mal-intent, recklessness, or even negligence on the part of the real state broker in making the involved representations—all that is needed to justify revocation is a prediction, relied upon, which doesn't come true, regardless of how reasonable the prediction was at the time it was made, and regardless of what factors subsequently intervened to prevent the prediction from coming true.

Appellant respectfully submits that Subdivisions (B) and (V) of T.R.C.S. Art. 6573(a), § 15(4), as construed and applied by the Fourteenth Court of Appeals in this case, have resulted in unreasonable, arbitrary and capricious action which has no real and substantial relation to the object the Texas Legislature sought to obtain in passing the Texas Real Estate License Act, i.e., "to eliminate or reduce fraud that might be occasioned on the public by unlicensed, unscrupulous or unqualified persons." *Henry S. Miller v. Treo Enterprises,* 585 S.W. 2d 674, 675-6 (Tex. 1979). It is relevant in this case that the representations Appellant was found to have made involved future actions to be carried out by HL&P,

Brown & Root and Spectra Corp., the companies which were responsible for constructing the roads and utilities; Appellant had no contractual relationship with, and no control over, these companies.

If Subdivisions (B) and (V) of Art. 6573(a), § 15(4), are deemed to properly allow the revocation of a real estate license without the need of substantial evidence and basic fact findings of mal-intent, or recklessness, or negligence, or at least unreasonable behavior, then Appellant respectfully submits that said provisions are unconstitutionally vague. Art. 6573(a), § 15(4)(B) proscribes:

> "The making of a false promise . . . when the licensee could not or did not intend to keep such promise."

Art. 6573(a), § 15(4)(V) proscribes:

> "conduct which constitutes dishonest dealings, bad faith, or untrustworthiness."

Appellant submits that both of said provisions on their face appear to require, for revocation of a license, some substantial evidence that the licensee intentionally lied, or at least made promises that could not come true in view of the circumstances existent at the time of the promises; neither of said provisions, on their face, appear to authorize license revocation without evidence that the licensee at least acted unreasonably in view of the facts at the time of the representation about future occurrences. Appellant submits that said provisions give no warning that a real estate license is subject to revocation upon the mere making of a representation about a future event,

relied upon by a buyer, which does not come true, even if the representation was made reasonably and in good faith and factors beyond the licensee's control prevent the future occurrences from taking place as anticipated and represented. The U.S. Supreme Court set out the due process principles applicable to the unconstitutionally vague statute involved in *Wright v. Georgia,* 373 U.S. 284, 287, 10 L.Ed. 349, 83 S.Ct. 1240 (1963) as follows:

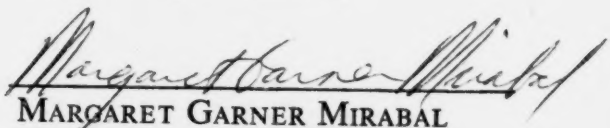
> A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. . . . No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. . . . In the light of our decisions, it appears upon a mere inspection that these general words or phrases are so vague and indefinite that any penalty prescribed for their violation constitutes a denial of due process of law. It is not the penalty itself that is invalid, but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all. . . .

The Texas Courts in this case have construed and applied Art. 6573(a), § 15(4) (B) and (V), T.R.C.S., in such a way as to subject Appellant to the supreme penalty of his profession—revocation of his real estate license. The supreme penalty was imposed irregardless of how reasonably Appellant may have conducted himself. The absence of any discernible state interest in the application of the subject statutes in the way they have been construed in this case only adds substantially to the Fourteenth Amendment claim.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,



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Counsel for Appellant

CERTIFICATE OF SERVICE

This is to certify that three copies of this Jurisdictional Statement have been served on all parties required to be served, i.e., on Appellee by placing same in an envelope and depositing it in the United States mail, certified mail, return receipt requested, with first-class postage prepaid, addressed to counsel of record as follows, Mr. George Warner, Assistant Attorney General, P. O. Box 12548, Capitol Station, Austin, Texas 78711-2548, on this 8th day of February, 1985.

Margaret Garner Mirabal

MARGARET GARNER MIRABAL

APPENDIX A

OPINIONS AND JUDGMENTS BELOW

Affirmed and Opinion filed April 26, 1984

B14-83-644-CV

HARRY LEROY KELLEY, Appellant

v.

TEXAS REAL ESTATE COMMISSION, Appellee

Appeal from the 61st District Court of Harris County
Cause No. 83-47500

OPINION

Appellant, Harry Leroy Kelley, appeals from a judgment affirming the revocation of his real estate broker license by the Texas Real Estate Commission. On March 8, 1983, the Texas Real Estate Commission convened an administrative hearing to determine whether to revoke appellant's license based upon several complaints from members of the public alleging misconduct. On May 5, 1983, the Commission entered an order revoking appellant's license. After the Commission overruled appellant's Motion for Rehearing, appellant appealed to the 61st District Court of Harris County, which affirmed the Commission order. After a hearing, appellant obtained a stay of the enforcement of the revocation order by filing a $2,500.00 supersedeas bond. He then perfected this appeal. We affirm the judgment of the trial court, which affirmed the Commission's order revoking appellant's license.

Appellant brings five points of error on appeal. In points of error one, two, three and four, appellant contends that the Texas Real Estate Commission's conclusion that he violated Sections 15(4)(B), (V)[1] of the Texas Real Estate License Act in connection with his dealings with the following: (1) Greg Taylor, (2) Raymond G. Stead, (3) Mr. and Mrs. Lawrence G.W. Twardy and (4) Ernest W. Pounders, was not reasonably supported by substantial evidence in view of the evidence in the record as a whole, and therefore, the trial court erred in refusing to set aside the Commission's revocation order. In point of error five, appellant argues that the Commission's revocation order, because it was not supported by substantial evidence, was arbitrary, capricious, an abuse of discretion and in excess of the Commission's statutory authority. We disagree.

This case involves the purchase of lots in a subdivision in Montgomery County. All four purchasers visited the property on different days between May and August of 1981 when the subdivision was in a pre-development stage. At this time, the roads and utilities had not been installed, trees had not been cleared and the only access to the property was by four-wheel drive vehicle. Each purchaser signed a contract for the purchase of a lot on his first visit to the subdivision.

Each contract contained the following provision:

> National Land Co. will be responsible for providing roads. The roads will be maintained by the County of Montgomery. Water will be provided by Spectra

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1. Tex. Rev. Civ. Stat. Ann. art. 6573(a) §§ 15(4) (B), (V) (Vernon Supp. 1982-83) are identical to Tex. Rev. Civ. Stat. Ann. art. 6573a §§ 15(6) (B), (V) (Vernon Supp. 1984).

> Corp. Sewers will be the responsibility of the individual property owner. The completion of the roads and amenities will be on or before December 31, 1983.

Four purchasers, Mr. Raymond G. Stead, Mr. Lawrence G. W. Twardy, Mr. Ernest W. Pounders, and Mr. Greg Taylor, testified, however, that appellant represented to each of them separately that the roads would be completed by August of 1981 and that the utilities, particularly the water and electricity, would be in service by that date. Each testified that appellant persuaded him to believe his representation rather than that of the contract and that the representation induced him to purchase property.

Electricity was not made available to the first section of the subdivision, in which all four individuals purchased lots, until mid-December of 1981. Water was not available to the first section until early January of 1982, and the roads were not finished in the whole subdivision until November of 1982.

Due to the delay, the purchasers became upset. They contacted the Attorney General's Office, the Better Business Bureau, the District Attorney's office and H.U.D., to no avail. They discussed their mutual complaints with one another, and learned that another property owner, Malcolm Johnson, had filed a complaint with the Texas Real Estate Commission about a different problem. The four aggrieved purchasers decided to go to the Commission with their complaints.

The Texas Real Estate Commission wrote a complaint letter dated February 18, 1983 to appellant. At the commission hearing, appellant denied that he told the

purchasers the roads and utilities would be available to their lots by August or September of 1981. Over an eighteen to twenty-four month period from 1981 to 1983, appellant sold approximately 250 out of the 268 lots in the subdivision, and only these four purchasers filed complaints.

In points of error one, two, three and four, appellant alleges that the charges that he violated Sections 15(4)(B), (V)[2] of the Texas Real Estate License Act were not supported by substantial evidence. We disagree.

The Texas Real Estate License Act authorizes judicial review of an administrative decision of the Texas Real Estate Commission. Tex. Rev. Civ. Stat. Ann. art. 6573a § 18 (Vernon Supp. 1984). Because this article does not define the scope of judicial review, the scope is determined by the Administrative Procedure and Texas Register Act. Tex. Rev. Civ. Stat. Ann. art. 6252-13a § 19 (Vernon Supp. 1984). Article 6252-13a § 19(e) requires that the Substantial Evidence Rule govern judicial review of administrative agency decisions in cases in which the agency's law does not define the scope of judicial review. Under this standard, the decision is deemed prima facie valid; *Imperial Am. Resources Fund v. R.R. Commission of Texas,* 557 S.W.2d 280 (Tex. 1977); and the one contesting it (appellant) has the burden of proof to demonstrate the invalidity of the order. *Texas Real Estate Commission v. Turner,* 547 S.W.2d 70 (Tex. Civ. App. —Austin 1977, writ ref'd n.r.e.).

The Substantial Evidence Rule has been expressed as "whether the evidence as a whole is such that reasonable minds could have reached the conclusions that the agency

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2. See footnote 1.

must have reached in order to justify its action." *Dotson v. Texas State Board of Medical Examiners*, 612 S.W. 2d 921, 922 (Tex. 1981). When substantial evidence supports an agency decision, Section 19(e) of the Administrative Procedure Act prohibits the court from substituting its judgment for that of the agency, even though the court might have struck a different balance. Tex. Civ. Stat. Ann. art. 6252-3a § 15 (Vernon Supp. 1982-83).

> Sec. 15. . . . The Commission may suspend or revoke a license issued under the provisions of this Act at any time when it has been determined that:
>
> (4) the licensee, while performing an act constituting an act of a broker or salesman, as defined by this Act, has been guilty of:
>
> (B) making a false promise of a character likely to influence, persuade or induce any person to enter into a contract or agreement when the licensee could not or did not intend to keep such promise.
>
> (V) conduct which constitutes dishonest dealings, bad faith or untrustworthiness.[3]

Appellant contends that § 15(4)(B) deals only with promises that the broker or salesman could perform himself, and that because the promise in our case was that amenities would be installed by third parties § 15(4)(B) does not apply. We disagree.

The statute speaks of promises the broker "could not" keep. By its own language, the statute clearly applies to a promise of the type made by appellant. Furthermore, this provision is meant to prevent inducement by false promise. A promise that a third party will do something

3. See footnote 1.

is an inducement just as is a promise by the promissor that he will do something.

Appellant argues that § 15(4)(V) requires evidence of the broker's bad intent. He claims that "bad faith", "dishonesty" and "untrustworthiness" all require a showing of intent, and that because no such showing was made here, there is not substantial evidence to support the Commission's decision.

Essentially, appellant asserts that these elements are equivalent to common law fraud and require evidence to prove that appellant knew the representations were false when he made them.

> It is a rule of statutory construction that every word of a statute must be presumed to have been used for a purpose. *Eddins-Walcher Butane Co. v. Calvert,* 156 Tex. 587, 298 S.W.2d 93, 96 (1957). Likewise, we believe every word excluded from a statute must also be presumed to have been excluded for a purpose. Only when it is necessary to give effect to the clear legislative intent can we insert additional words or requirements into a statutory provision. *Mauzy v. Legislative Redistricting Board,* 471 S.W.2d 570, 572 (Tex. 1971); *See Texas & N.O. R. Co. v. Texas Railroad Comm.,* 145 Tex. 541, 200 S.W.2d 626, 629 (1947).

Cameron v. Terrell and Garrett, Inc., 618 S.W.2d 535, 540 (Tex. 1981). If the legislature meant fraud, it could have used that term. The use of the words: "bad faith", "dishonesty" and "untrustworthiness" shows an intent to prevent acts even less culpable than common law fraud.

Furthermore, even if fraud were required in order to violate § 15(4)(V), the Commission did not have to show that appellant knew the representations were false.

"The maker of a false representation need not, in every instance, know it is false for the statement to form the basis for actionable fraud." *Wright v. Carpenter,* 579 S.W.2d 575, 579 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.). Expressions of opinions on the happening of a future event may constitute fraud "where the speaker purports to have special knowledge of facts that will occur or exist in the future." *Trenholm v. Ratcliff,* 646 S.W.2d 927, 930 (Tex. 1983).

In our case, appellant purported to have special knowledge, and this knowledge induced others to depend upon promises which were not true. Appellant's actions violated Tex. Rev. Civ. Stat. Ann. art. 6573a §§ 15(4) (B), (V) and constituted fraud. There being substantial evidence of this violation, we overrule points of error one, two, three and four.

In point of error five, appellant contends that in view of the lack of substantial evidence to support the Commission's decision, a revocation of his license was arbitrary, capricious, an abuse of discretion, and outside the scope of the Commission's authority. We disagree. As discussed above, we hold that there was substantial evidence to support the Commission's decision. Therefore, appellant's claims under point of error five are without merit. We overrule point of error five.

Accordingly, we affirm the judgment of the trial court.

/s/ George T. Ellis
Associate Justice

Judgment rendered and Opinion filed April 26, 1984.

Panel consists of Associate Justice Pressler, Robertson and Ellis.

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Garson R. Jackson, Clerk

October 10, 1984

Ms. Margaret Garner Mirabal
Mirabal & Associates
4606 FM 1960 West
Suite 310
Houston, TX 77069

RE: Case No. C-3184

STYLE: HARRY LEROY KELLEY
v. TEXAS REAL ESTATE COMMISSION

Dear Counsel:

Today, the Supreme Court of Texas refused the above referenced application for writ of error with the notation, No Reversible Error.

Respectfully yours,

Garson R. Jackson, Clerk

By: /s/ Courtland Crocker
Deputy

cc. Mr. George Warner, Asst. A.G.
Office of the Attorney General
Jim Mattox, A.G.
P. O. Box 12548 Capitol Station
Austin, TX 78711

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
61st JUDICIAL DISTRICT

NO. 83-47500

HARRY LEROY KELLEY,
Plaintiff

v.

TEXAS REAL ESTATE COMMISSION,
Defendant

ORDER

On the 29th day of July, 1983, came on to be heard and considered this cause of Plaintiff Harry Leroy Kelley for judicial review of the administrative decision of the Texas Real Estate Commission revoking his real estate licensure privileges pursuant to the Real Estate License Act, TEX. REV. CIV. STAT. ANN. art. 6573a, and the Administrative Procedure and Texas Register Act, TEX. REV. CIV. STAT. ANN. art. 6252-13a. Plaintiff Harry Leroy Kelley was represented by attorney Philip Boyko, and the Texas Real Estate Commission was represented by Assistant Attorney General George Warner.

Having reviewed Plaintiff's Petition and the Response of the Texas Real Estate Commission, and the arguments of counsel, and the record of the Administrative Proceeding before the Texas Real Estate Commission in Hearing Number 83-63-82218, In The Matter Of Harry Leroy Kelley, the Court finds that the decision of Texas Real Estate Commission revoking the real estate broker licensure privileges of Harry Leroy Kelley is supported

by substantial evidence in the record of the proceeding before the Texas Real Estate Commission.

The Court further finds that the record of the proceeding before the Texas Real Estate Commission shows that the decision of the agency is neither arbitrary nor capricious nor characterized by any abuse of discretion or clearly unwarranted exercise of discretion. The Court also finds no unreasonable delay committed by the Texas Real Estate Commission which prejudiced any legal rights of Plaintiff Harry Leroy Kelley in the proceeding before the Texas Real Estate Commission.

It is therefore ORDERED, ADJUDGED, and DECREED that the decision of the Texas Real Estate Commission revoking the real estate broker licensure privileges of Harry Leroy Kelley based on the record of Hearing Number 83-63-82218, In The Matter of Harry Leroy Kelley, be in all things affirmed, and that the order of revocation take effect upon the date of the signing of this Order. All costs are taxed to the Plaintiff in this cause.

SIGNED this 10th day of August, 1983.

/s/ SHEARN SMITH
Judge Presiding

HEARING NO. 83-63-82218

IN THE MATTER OF HARRY LEROY KELLEY

TEXAS REAL ESTATE BROKER
LICENSE NO. 217300

BEFORE THE TEXAS REAL ESTATE COMMISSION

SITTING IN HOUSTON, HARRIS COUNTY, TEXAS

BE IT REMEMBERED that on the 8th day of March, 1983, the above-styled hearing was held and Harry Leroy Kelley, having been duly notified of said hearing and of the allegations against him, appeared in person and by counsel.

The Commission, after having read the allegations set forth in the hearing notice and having considered the evidence and arguments presented, makes the following findings of fact and conclusions of law and enters the stated order:

I

FINDINGS OF FACT

that on or about July 20, 1981, Harry Leroy Kelley, then and now a Texas-licensed real estate broker, while acting as a real estate agent in Texas, negotiated the sale to Raymond G. Stead of real property located in Park Place, a subdivision located in Montgomery County, Texas; that prior to the purchase of the property, Harry Leroy Kelley stated to Ray-

mond G. Stead that Brown & Root were part owners of the property, and that, weather permitting, they would have five or six crews on the property and the roads within the first section of the sub-division would be completed by August 15, 1981; that Harry Leroy Kelley further stated to Raymond G. Stead that utilities (water and electricity) would be available within the first section of the sub-division by August 15, 1981; that in reliance on these statements Raymond G. Stead purchased a lot in the first section of the subdivision; that Raymond G. Stead, while relying on these statements made by Harry Leroy Kelley, purchased a mobile home from Spring Mobile Home to be placed on the property he had purchased; that the statements made by Harry Leroy Kelley that the roads in the first section of the sub-division would be completed by August 15, 1981, were not true; that the statements made by Harry Leroy Kelley that the utilities (water and electricity) would be available in the first section of the sub-division by August 15, 1981 were not true; that electricity was not available in the first section of the sub-division until on or about December 16, 1981; that water was not available in the first section of the sub-division until on or about January 9, 1982; that the roads in the sub-division were not completed until November of 1982;

CONCLUSIONS OF LAW

that the aforesaid acts and omissions on the part of Harry Leroy Kelley are conduct which constitutes bad faith, dishonest dealings, or untrustworthiness in violation of § 15(4)(V) of The Real Estate Li-

cense Act and are cause for the suspension or revocation of Harry Leroy Kelley's Texas real estate broker licensure privileges.

II

FINDINGS OF FACT

that on or about June 23, 1981, Harry Leroy Kelley, then and now a Texas-licensed real estate broker, while acting as a real estate agent in Texas, negotiated the sale to Mr. and Mrs. Lawrence G. W. Twardy of real property located in Park Place, a subdivision located in Montgomery County, Texas; that prior to the purchase of the property, Harry Leroy Kelley assured Lawrence G. W. Twardy that all utilities and the roadway would be completed by August 1, 1981; that Harry Leroy Kelley assured Lawrence G. W. Twardy that if water and electricity were not available to the property by that date that he would either dig the lines and lay them himself or he would hand carry all the things that were needed to sustain them; that in reliance on these statements, Mr. and Mrs. Twardy, on or about August 3, 1981, took delivery of and placed a mobile home on the property; that neither water nor electricity was available to the property on August 1, 1981, as promised by Harry Leroy Kelley; that on or about October 26, 1981, having neither water nor electricity, Mr. and Mrs. Twardy moved the mobile home from the property;

CONCLUSIONS OF LAW

that the aforesaid acts and omissions on the part of Harry Leroy Kelley constitute bad faith, dishonest

dealings, or untrustworthiness in violation of § 15 (4)(V) of The Real Estate License Act and are cause for the suspension or revocation of Harry Leroy Kelley's Texas real estate broker licensure privileges.

III

FINDINGS OF FACT

that on or about August 8, 1981, Harry Leroy Kelley, then and now a Texas-licensed real estate broker, while acting as a real estate agent in Texas, negotiated the sale to Ernest W. Pounders of real property located in Park Place, a subdivision located in Montgomery County, Texas; that prior to the purchase of the property, Harry Leroy Kelley assured Ernest W. Pounders that the roadways and all other amenities to the property would be completed by August 15, 1981; Harry Leroy Kelley stated that the property was protected by a security guard; that the roads were not completed and water and electricity were not available by August 15, 1981; that no security guard was provided as stated by Harry Leroy Kelley;

CONCLUSIONS OF LAW

that the aforesaid acts and omissions on the part of Harry Leroy Kelley are conduct which constitutes bad faith, dishonest dealings, or untrustworthiness in violation of § 15(4)(V) of The Real Estate License Act and are cause for the suspension or revocation of Harry Leroy Kelley's Texas real estate broker licensure privileges.

IV

FINDINGS OF FACT

that on or about May 17, 1981, Harry Leroy Kelley, then and now a Texas-licensed real estate broker, while acting as a real estate agent in Texas, negotiated the sale to Greg Taylor of real property located in Park Place, a subdivision located in Montgomery County, Texas; that prior to the purchase of the property Harry Leroy Kelley stated to Greg Taylor that Brown and Root were part owners of the property; that prior to the purchase of the property, Harry Leroy Kelley promised Greg Taylor that the property would be ready to move on to by September, 1981; that the promise was made to induce Greg Taylor to purchase the property; that the roads and utilities were not available or installed on September, 1981, as promised by Harry Leroy Kelley;

CONCLUSIONS OF LAW

that the aforesaid acts and omissions on the part of Harry Leroy Kelley constitute making a false promise of a character likely to influence, persuade, or induce any person to enter into a contract or agreement when the licensee could not or did not intend to keep such promise in violation of Section 15(4)(B) of The Real Estate License Act and are cause for the suspension or revocation of Harry Leroy Kelley's Texas real estate broker licensure privileges.

V

FINDINGS OF FACT

that the allegations concerning the purchase of property by Bob Jones made by the Texas Real Estate

Commission in Paragraph V of the allegation letter introduced as Commission Exhibit 1 are not supported by a verified complaint in writing or by motion of the Commission as required by Section 15 of Article 6573a, V.A.C.S.

CONCLUSIONS OF LAW

that the allegations made by the Texas Real Estate Commission in Paragraph V of Commission Exhibit 1 should be dismissed and such allegations, together with Commission Exhibit 16 and all other evidence introduced in support thereof, should not be considered for any purpose.

VI

FINDINGS OF FACT

that at the outset of testimony of the first witness, Raymond G. Stead, counsel for the respondent, in open hearing moved that all witnesses who were not complaining parties, or their spouses, be placed under the rule and not be allowed to remain in the room to hear the testimony of other witnesses; that counsel for the Texas Real Estate Commission stated that no such persons other than Curtis Conner and Margot Breaux, were present in the room; that Gerald L. Davis, who was neither a complaining witness nor a spouse thereof, was at that time present in the hearing room; that Gerald L. Davis was later called as a witness by counsel for the Texas Real Estate Commission; that at the time Gerald L. Davis testified at the hearing, neither counsel objected or called to the attention of the hearings officer that Gerald L. Davis had been present in the hearings room during the testimony of Raymond G. Stead;

CONCLUSIONS OF LAW

that the testimony of Gerald L. Davis was improperly introduced at the hearing and that such testimony, together with Commission Exhibit 7 and all other evidence introduced in support thereof, should be disregarded for all purposes.

ORDER

IT IS HEREBY ORDERED that the Texas real estate broker licensure privileges issued to Harry Leroy Kelley be, and the same are, revoked and in all things held for naught as of 5:00 P.M., June 19, 1983.

IF ENFORCEMENT OF THIS ORDER is restrained or enjoined by an order of a court, this order shall then become effective upon a final determination by said court or appellate court in favor of the Texas Real Estate Commission.

TEXAS REAL ESTATE
COMMISSION

/s/ ROBERT E. OWEN
Robert E. Owen,
Assistant Administrator

May 5, 1983

COURT OF APPEALS
14th Supreme Judicial District
1307 San Jacinto, 11th Floor
Houston, Texas 77002

May 17, 1984

Hon. Philip W. Boyko
7322 Southwest Freeway
Arena Tower I, Suite 640
Houston, TX 77074

Hon. Margaret Garner Mirabal
Mirabal & Associates
4606 FM 1960 West
Suite 310
Houston, TX 77068

George Warner
Attorney General's Office
State and County Affairs
P. O. Box 12548
Austin, TX 78711

RE: CASE NO. 14-83-00644-CV
TRIAL COURT CASE NO. 83-47500

STYLE: Kelley, Harry Leroy
v. Texas Real Estate Commission

Gentlemen:

Please be advised that, on this date, the Court OVERRULED appellant's(s') motion for rehearing in the above cause.

Further, application for writ of error, if any, must be submitted on or before Monday, June 18, 1984.

Respectfully yours,

MARY JANE SMART, Clerk

By: CHARLENE MITCHELL
Deputy

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Garson R. Jackson, Clerk

November 14, 1984

Ms. Margaret Garner Mirabal
Mirabal & Associates
4606 FM 1960 West
Suite 310
Houston, TX 77069

RE: Case No. C-3184

STYLE: HARRY LEROY KELLEY
v. TEXAS REAL ESTATE COMMISSION

Dear Counsel:

Today, the Supreme Court of Texas overruled Petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,

Garson R. Jackson, Clerk

By: Mary M. Wakefield
Deputy

cc. Mr. George Warner, Asst. A.G.
Office of the Attorney General
Jim Mattox, A.G.
P. O. Box 12548 Capitol Station
Austin, TX 78711

NO. 14-83-00644-CV

IN THE COURT OF APPEALS FOR THE
FOURTEENTH SUPREME JUDICIAL
DISTRICT OF TEXAS AT
HOUSTON, TEXAS

HARRY LEROY KELLEY
Appellant

v.

TEXAS REAL ESTATE COMMISSION
Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Margaret Garner Mirabal
Mirabal & Associates
4606 FM 1960 West, Suite 310
Houston, Texas 77069
(713) 580-0651
Attorneys for Appellant,
Harry Leroy Kelley

NO. 14-83-00644-CV

IN THE COURT OF APPEALS FOR THE
FOURTEENTH SUPREME JUDICIAL
DISTRICT OF TEXAS AT
HOUSTON, TEXAS

HARRY LEROY KELLEY
Appellant

v.

TEXAS REAL ESTATE COMMISSION
Appellee

NOTICE OF APPEAL TO THE SUPREME
COURT OF THE UNITED STATES

TO THE HONORABLE COURT OF APPEALS:

Notice is hereby given that Harry Leroy Kelley, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals for the Fourteenth Supreme Judicial District of Texas, entered in this action on April 26, 1984.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Respectfully submitted,

/s/ Margaret Garner Mirabal
Margaret Garner Mirabal
TBA No. 14199550
Mirabal & Associates
4606 FM 1960 West, Suite 310
Houston, Texas 77069
(713) 580-0651
Attorneys for Appellant

CERTIFICATE OF SERVICE

This is to certify that a copy of this Notice of Appeal to the Supreme Court of the United States has been served on Appellee by sending a copy, by certified mail, return receipt requested, to Appellee's attorney, to wit: Mr. George Warner, Assistant Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas 78711-2548, on this 5th day of February, 1985.

/s/ Margaret Garner Mirabal
Margaret Garner Mirabal

Office-Supreme Court, U.S.
FILED
MAR 4 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1293

* * * *

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

* * * *

HARRY LEROY KELLEY,

Appellant,

V.

TEXAS REAL ESTATE COMMISSION,

Appellee.

* * * *

ON APPEAL FROM THE
COURT OF APPEALS FOR THE
FOURTEENTH SUPREME JUDICIAL
DISTRICT OF TEXAS

* * * *

MOTION TO DISMISS OR AFFIRM

* * * *

JIM MATTOX
Attorney General of Texas

DAVID R. RICHARDS
Executive Assistant

J. PATRICK WISEMAN
Chief, State & County Affairs

GEORGE WARNER
Assistant Attorney General

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BEST AVAILABLE COPY

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No. 84-1293

* * * *

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

* * * *

HARRY LEROY KELLEY,

Appellant,

V.

TEXAS REAL ESTATE COMMISSION,

Appellee.

* * * *

ON APPEAL FROM THE
COURT OF APPEALS FOR THE
FOURTEENTH SUPREME JUDICIAL
DISTRICT OF TEXAS

* * * *

MOTION TO DISMISS OR AFFIRM

Appellee Texas Real Estate Commission moves the Court, under Rule 16 of the Rules of the Supreme Court of the United States, to dismiss the appeal or, in the alternative, to affirm the decision of *Kelley v. Texas Real Estate Commission*, 671 S.W.2d 936 (Tex.Ct.App. — Houston [14th Dist.] 1984, writ ref'd n.r.e.). This Court should decline to review the decision below because this appeal is not within the Court's jurisdiction, and because the issues presented by the decision of the court below do not warrant further argument.

STATEMENT OF THE CASE

After the Texas Real Estate Commission revoked the real estate broker license of Harry Leroy Kelley by Order dated May

5, 1983, Kelley sought judicial review of that administrative decision in the 61st Judicial District Court of Texas, Harris County. The court affirmed the decision of the Commission by Order dated August 10, 1983. Kelley then appealed to the Houston Court of Appeals for the Fourteenth Judicial District of Texas, which also affirmed the decision of the Commission in an Opinion issued April 26, 1984.

Kelley then sought review by the Texas Supreme Court by Application for Writ of Error filed June 18, 1984. On October 10, 1984 the Texas Supreme Court refused Kelley's Application for Writ of Error, noting no reversible error. The Texas Supreme Court then overruled Kelley's Motion for Rehearing of his Application for Writ of Error on November 14, 1984.

ARGUMENT

The Supreme Court may review final judgments rendered by the highest court of the state by appeal if the validity of the state law is attacked as repugnant to the United States Constitution and the state court has upheld its validity. 28 U.S.C.A. §1257(2). Where the Appeal raises federal constitutional attacks to the state law which were not raised, considered, or expressly passed on in the state courts, the Court should dismiss the Appeal. The Court should dismiss this Appeal because it seeks review of federal constitutional issues neither raised nor expressly passed on the state courts. Sup.Ct.R. 16.1(b).

The Supreme Court is vested with "...no jurisidiction unless a federal question was raised and decided in the state court below..." in cases on appeal from state courts. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). To vindicate jurisdiction it must first be decided whether the federal question was presented to the state courts "...in such a manner that it was necessarily decided..." by the state court. *Street v. New York*, 394 U.S. 576, 581 (1969). The record must be examined with "...sufficient rigor..." as there "...should be no doubt..." that the federal claim was "...either expressly or by clear implication...adequately presented in the state system." *Webb v. Webb*, 451 U.S. 493, 499, 501, 496-97 (1981).

Comity requires that the state courts be given the first opportunity to consider federal constitutional questions involving the acts of state officials and "...proposed changes in existing remedies for unconstitutional action..." *Webb, supra,* at 499; *Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317, 2323 (1983). There exists "... reasons of peculiar force..." involving "...due regard for the appropriate relationship of this Court to state courts..." which restrain the Supreme Court from considering questions not presented to the state courts. *Gates, supra,* at 2322, *quoting McGoldrick v. Compagnie Generale,* 309 U.S. 430, 434 (1940).

The Court has considered federal questions where it was not absolutely clear that they had been presented in the state courts, treating the rule against considering such issues as "merely a prudential restriction". *Gates, supra,* at 2322, 2324; *see Vachon v. New Hampshire,* 414 U.S. 478 (1974). More "weighty prudential considerations" have, however, recently motivated the Court "...to adhere scrupulously to the customary limitations on our discretion...", *Id.,* at 2325, to avoid "untoward practical ramifications", *Id.,* at 2325, and the "unseemly" nature of federal reversals of state court decisions. *Webb, supra,* at 500, *quoting Picard v. Connor,* 404 U.S. 270, 275 (1971).

As the Court stated in *Webb, supra,* at 500:

> (t)here are also very practical reasons for insisting that federal issues be presented first in the state-court system. The requirement affords the parties the opportunity to develop the record necessary for adjudicating the issue. It permits the state courts to exercise their authority, which federal courts, including this one, do not have at least to the same extent, to construe state statutes so as to avoid or obviate federal constitutional challenges such as vagueness and overbreadth. The rule also insures that if there are independent and adequate state grounds that would pretermit the federal issue, they will be identified and acted upon in an authoritative manner.

> Finally, if the parties to state-court litigation are required to present their federal claims in the state tribunals in the first instance, those issues will be adjudicated in the state courts where necessary to dispose of the case...

Since the Court assumes that state courts are competent to adjudicate federal constitutional claims, these federal issues should be heard at the state level first. *D.C. Court of Appeals v. Feldman*, 460 U.S. 472, 484 F.N. 16 (1983). This rule of avoiding on jurisdictional grounds resolution of federal constitutional issues first pursued in the Supreme Court has been reiterated in *New York v. Quarles*, 467 U.S._____, 104 S.Ct. 2626, 2637 F.N. 2 (O'Connor, J., concurring in part and dissenting in part), 2649 F.N. 11 (Brennan, J., dissenting) (1984).

The jurisdictional requirements are not met in this Appeal. The federal constitutional issues raised in the Jurisdictional Statement have not yet been presented to, nor considered by, the Texas courts. Certainly no state court in Texas has expressly passed on these constitutional questions. Kelley errs when he states that he raised these issues in the state courts. (Jurisdictional Statement, at 6). One searches in vain to find any reference to the United States Constitution in the state court proceedings. No such issue was ever articulated in any pleading before the trial court, nor the Court of Appeals. Contrary to his assertion that he raised the issue in his Motion for Rehearing before the 14th Court of Appeals (Jurisdictional Statement, at 6), it is an obstacle one finds insurmountable to locate any reference in the Motion for Rehearing. Moreover, his admission that he did not raise the issue until then shows that it was untimely and improperly raised. Why was it not raised before the trial court? Why was it not raised before the Court of Appeals prior to its decision?

Kelley's Application for Writ of Error to the Texas Supreme Court also fails to mention this now important issue. Kelley's filing of a "Supplement/Amendment" to his Application for Writ of Error proves this point. Had he properly raised the issue, what need would there have been for an amendment? It must be noted that Kelley surfaced with this "Supplement/Amendment" after the State had filed its response to Kelley's Application for Writ of Error.

No Texas court has ever had submitted to it, and certainly never expressly passed on, the constitutional claims Kelley now asserts in this case. Comity in federal-state relations dictates dismissal of this Appeal. It would be "unseemly" for this Court now to hear these questions in light of its goal to "adhere scrupulously" to the limits of its jurisdiction. Texas courts should have had a chance to assay these federal claims. Such an opportunity may have avoided the need for any federal consideration. Texas has an important state interest in protecting its citizens from unscrupulous real estate brokers as well as in construing its own statutes. Texas courts are concerned with state laws attacked as unconstitutional. The record on these accusations should have been developed in state court. Surely Texas courts should have been given the opportunity to consider these questions first, particularly in light of their competency to consider these questions. Kelley denied Texas its opportunity to consider these questions. The Court should decline to consider them now.

This appeal should be dismissed additionally as it does not present a substantial federal question. Sup.Ct.R. 16.1(b). The Texas statutes are attacked as unconstitutionally vague, arbitrary and capricious, and repugnant to the United States Constitution. The statutes authorize revocation of a real estate license for conduct which includes making a false promise, or constitutes dishonest dealings, bad faith, or untrustworthiness. TEX.REV.CIV.STAT.ANN. art. 6573a, §15(4)(B), §15(4)(V) (now §15(6)(B), §15 (6) (V)). These state laws are not unconstitutionally vague, nor arbitrary and capricious, nor repugnant to the United States Constitution.

Laws containing language eminently more ambiguous have been upheld. The Court in *Arnett v. Kennedy*, 416 U.S. 134 (1974), upheld as constitutionally sufficient against allegations of overbreadth and vagueness statutory language which authorized dismissal of federal employees for "such cause as will promote the efficiency of the service." *Id.*, at 160 (1974). The revocation of a medical license for conduct constituting "grossly unprofessional or dishonorable conduct, or a character which in the opinion of the Board is likely to deceive or defraud the public" was upheld in *Martinez v. Texas State Board of Medical Examiners*, 476 S.W.2d 400, 403-404 (Tex.Civ.App.

—San Antonio 1972, writ ref'd n.r.e.), *appeal dismissed for want of a substantial federal question,* 409 U.S. 1020 (1972). As the Court said in *Arnett, supra,* at 159,;

> ...(t)here are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest...,

quoting Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548, 578-79 (1973). Ordinary people exercising "ordinary common sense" certainly understand what dishonest dealings, bad faith, and untrustworthiness mean. Additionally, the Texas Real Estate Commission has the special expertise to apply these terms to the conduct of a licensed real estate agent who deals with the public. Certainly these statutory terms are clearer than "unprofessional conduct" and "promoting efficiency."

While many of the cases cited in this Motion deal within review under petitions for certiorari, the cases generally refer to jurisdictional authority under 29 U.S.C.A. §1257. If the Court determines to review this appeal as though by writ of certiorari, under that manner of review these same authorities in support of the same analysis apply and this petition should be denied. 28 U.S.C.A. §2103. *Perry Educ. Assn. v. Perry Local Educator's Assn.,* 460 U.S. 37, 43 (1983), *Palmore v. United States,* 411 U.S. 389, 394-97 (1973).

CONCLUSION

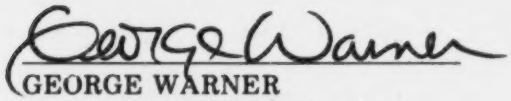
The Appeal of Harry Leroy Kelley should be dismissed for lack of jurisdiction because the federal constitutional issues he now raises before the Supreme Court were not raised, considered, nor decided in the state courts. This Appeal should also be dismissed for want of a substantial federal question, or, in the alternative, the decision below should be affirmed.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

DAVID R. RICHARDS
Executive Assistant
Attorney General

J. PATRICK WISEMAN
Chief, State and County Affairs



GEORGE WARNER
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Bar No. 20869500
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Austin, Texas 78711
(512) 475-1101

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document has been forwarded by certified mail, return receipt requested, to Margaret Garner Mirabal, Mirabal & Associates, 4606 F.M. 1960 West, Suite 310, Houston, Texas 77069, on this the 27th day of February 1985.

GEORGE WARNER